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JURISDICTIONAL STATEMENT

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1963

Case No. 931

LYNCHBURG TRAFFIC BUREAU (CORP.)
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Appellees.

Appeal from the District Court of Three Judges for the Western District of Virginia to the Supreme Court of the United States.

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UNITED STATES OF AMERICA and
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Appeal from the District Court of Three Judges for the Western District of Virginia to the Supreme Court of the United States.

BRIEF FOR THE APPELLANT

STATEMENT

This is a direct appeal under 28 U.S.C. 1253 from a decision of a three-Judge District Court to the Supreme Court of the United States.

A final order was entered on November 21, 1963, and the order denying motion of plaintiff for reconsideration was entered on December 31, 1963. Notice of Appeal was filed December 20, 1963, and an order was entered on January 16, 1964 enlarging the present period by 30 days

in which to file the record with this Court and for plaintiff to complete the appeal. This decision of the Court is reported at ..... Fed Sup. ..... a copy of which is attached as Appendix A, and of the Commission reported at ..... I.C.C. ..... a copy of which is attached as Appendix B.

THE QUESTIONS PRESENTED

The questions presented are:

(1) Is it proper and consistent with statutory provisions and not arbitrary and capricious for the Interstate Commerce Commission to use a different yardstick in measuring the reasonableness and lawfulness of rates and charges on fine coal to Lynchburg, an intermediate point to Danville, than the yardstick the Commission used in measuring the reasonableness and lawfulness of rates and charges on fine coal to Danville, the more distant point;

(2) Is it proper and consistent with statutory provisions and not arbitrary and capricious for the Interstate Commerce Commission to sanction and allow the establishment on fine coal of rates and charges, which rates and charges disrupt a relationship in rates between Lynchburg and Danville that the defendant carriers first established some 60 years ago and which rate relationship has been for over 60 years confirmed, fixed, and required to be maintained by the Interstate Commerce Commission; and

(3) Is it proper and consistent with statutory provisions and not arbitrary nor capricious for the Interstate Commerce Commission to sanction the maintenance of rates and charges on fine coal at Danville which tends to destroy Lynchburg and to build up Danville at the expense of

Lynchburg; i.e., the same rates at Lynchburg and Danville when there should lawfully be 50 cents a ton difference in the rates between the two points.

HISTORY

A review of the history of the rates on coal to Lynchburg and Danville will clearly demonstrate the fact that the decisions of the Court and of the Commission are erroneous in fact and law, as there is no basis in law or fact to justify the same rates on coal at Lynchburg and Danville.

The history of the rates on coal to Lynchburg and Danville is found in decisions of the Commission dating back more than 60 years. Those decisions will show that the Commission has always, prior to its decision in this case, prescribed a lower rate on coal to Lynchburg than it prescribed to Danville. The difference has not been less than 40 cents a ton nor more than 70 cents a ton lower to Lynchburg than to Danville and these facts point up the errors found in the decisions of the District Court and of the Commission.

In *City of Danville* v. *Southern Railway*, 8 I.C.C. 409, decided in 1900, the Commission, on the complaint of Danville alleging discrimination against Danville and preference to Lynchburg, found the discrimination and preference to exist, but the order of the Commission was set aside because the defendant, Southern Railway, could not alone remove the preference and discrimination (See *Interstate Commerce Commission* v. *Southern Railway*, 117 Federal 741).

In *City of Danville* v. *Southern Railway Company*, 34

I.C.C. 430, decided in 1915, on allegation that rates to Danville were unreasonable and unjustly discriminatory in that they unduly prefer Lynchburg, Richmond, and Roanoke, the Commission prescribed a reasonable rate on coal of 210 cents a ton from the Pocahontas group to Danville, Virginia, for distance of 271 miles via Lynchburg. In reaching the conclusion that the rate of 220 cents to Danville was unlawful, that rate was compared with the rate of 150 cents a ton to Lynchburg. The existence of a rate relationship between Danville and Lynchburg was recognized by the Commission in *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, where the Commission stated, in 1915, the relationship in rates between Lynchburg and Danville as follows:

> "The rates to points on the Southern Railway south of Lynchburg are blanketed; $2 to stations within 40 miles of Lynchburg and $2.20 to stations farther distant to and including Danville (441)."

The rate relationship between Danville and Lynchburg was actually fixed in 1915 at 60 in favor of Lynchburg (210 against 150) and the report (34 I.C.C. 430) shows the existence of the rate relationship.

In Bituminous Coal Rates to the Southeast, 37 I.C.C. 652, decided December 31, 1916, the Commission prescribed a rate on bituminous coal from Pocahontas group to Lynchburg of 140 cents a ton for distance of 205 miles. In the Bituminous Coal Rates to the Southeast supra, the Commission fixed a relationship between all mines in West Virginia, Kentucky, Virginia, and Tennessee to all points in Carolina Territory including Danville and in that same

decision prescribed a rate of 140 cents a ton to Lynchburg and left in effect the Danville rate of 210 cents a ton, thus making the rate relationship 70 cents per ton between Danville and Lynchburg.

In *Danville Chamber of Commerce* v. *Southern Railway*, 191 I.C.C. 20, the Commission, on January 30, 1933, prescribed a rate of 255 cents a ton from the Pocahontas group to Danville for distance of 271 miles via Lynchburg.

In *State Corporation Commission of Virginia* v. *N. & W. Railway*, 190 I.C.C. 325, decided December 19, 1932, and *Staunton Brick Company* v. *C. & O. Railway*, 190 I.C.C. 302, decided December 19, 1932, the Commission prescribed a rate of 215 cents a ton from Pocahontas-New River District to Lynchburg, Virginia. The rate relationship was fixed in 1933 at 40 cents a ton between Danville and Lynchburg.

In *Ashland Coal and Ice* v. *A.C.L.*, 256 I.C.C. 429, decided November, 1943, the Commission prescribed a rate of 205 cents a ton to Lynchburg. The rate relationship was again made 50 cents a ton between Danville and Lynchburg.

In *Carolina Coal Consumers Conference* v. *A. & R.*, 270 I.C.C. 291, decided in 1948, the Commission again fixed the rate to Danville at 255 cents. The rate relationship was again made 50 cents a ton between Danville and Lynchburg and that rate relationship remained in effect until 1954 when defendant carriers made the first reduction in the rate relationship by reducing the rate 30 cents a ton, by 35 cents a ton and by 10 cents a ton and the failure to reduce the rate to Lynchburg accordingly results in an unlawful destruction of a prescribed rate relationship.

COMPLAINT

Plaintiff filed with the Interstate Commerce Commission on July 21, 1961, a formal complaint against the rail rates on coal moving in carloads from Pocahontas-New River groups to Lynchburg, Virginia. The bituminous coal involved in this complaint is described in the tariffs as:

> "Coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent, a two-inch mesh or two-inch round perforation."

and it will be called hereinafter "fine coal."

It was alleged in the complaint that the assailed rates on fine coal to Lynchburg, Virginia, were unjust, unreasonable, and discriminatory in violation of Sections 1, 2, 3, and 4 of the Act. The cause for the complaint was the several reductions made in the rate on fine coal to Danville resulting in higher rates at Lynchburg than at Danville and the maintenance of the same rates at Lynchburg and Danville, contrary to decisions of the Interstate Commerce Commission dating back to 1900 in which higher rates on coal were prescribed to Danville than to Lynchburg. These decisions thus established as a fact and in law, that higher rates at Lynchburg than at Danville or the same rates at Lynchburg as at Danville are unlawful at Lynchburg to the extent the rate to Lynchburg is not at least 50 cents a ton lower than the rate to Danville.

It is the contention of plaintiff that since the Interstate Commerce Commission has for over 45 years prescribed on coal moving from the Pocahontas and New River groups

to Danville, a higher rate to Danville than the rates the Interstate Commerce Commission has prescribed on the same coal moving to Lynchburg, that the same rate to Lynchburg as to Danville or a higher rate at Lynchburg than at Danville is a rate to Lynchburg that is, as a matter of law, unreasonable and otherwise unlawful in violation of the Interstate Commerce Act.

The decision of the Commission in this proceeding holding that the Danville rate, when applied at Lynchburg, is not unjust or unreasonable at Lynchburg, is arbitrary, capricious, an abuse of discretion, not in accordance with law and unsupported by substantial evidence and the decision of the District Court sustaining the Commission is also contrary to law on the same grounds assigned to the decision of the Commission. The proof of these facts is found in decisions of the Commission beginning in 1900, holding that Lynchburg is lawfully entitled to a lower rate on coal than Danville, Virginia. The Commission, in those decisions, has fixed the difference to be on an average of 50 cents a ton lower to Lynchburg than to Danville and that relationship is required to be maintained at Lynchburg to meet the requirements of the Act and the decisions of the Commission. The decision of the District Court in dismissing the complaint is contrary to law and the facts of record as it disregards completely the decisions of the Commission, the evidence of record, not in keeping with applicable law and is contrary to decisions of the Courts.

DISCRIMINATION

The alleged discrimination between Lynchburg and Danville exists as a matter of fact and law based on decisions

of the Commission finding the discrimination existing which the Courts have affirmed.

The complaint alleged unjust discrimination and undue preference and in response thereto, the Commission said:

> "The record fails to show that any new industry has refused to locate at Lynchburg, or that any industry has left that City because of the assailed rate situation, or that any industry was induced thereby to locate at other points named."

This standard of measurement does not overlook the existence of discrimination but it seeks to evade the removal of it.

The District Court for the Northern District of California, Northern Division, in opinion in Civil No. 8471 rendered February 7, 1964 in *Stanislaus County et al* v. *United States of America* and *Interstate Commerce Commission*, answers that contention of the Commission as follows:

> "Industry in Stanislaus County may well have grown at an even faster rate had it not been for the rate disparity. We cannot say that the Commission could reasonably conclude from the evidence that plaintiffs had not shown injury. Accordingly, we must set aside the Commission's finding that plaintiffs had failed to establish injury."

There was no evidence introduced by defendant carriers that the rate situation "was not the cause for the smaller growth of Lynchburg." In fact, the period of time in

which the rate situation had been in effect was hardly sufficient time to prove actual pecuniary damage, but the time the rate situation had been in effect was sufficient to show what the rate situation was doing and that it would continue to do irreparable damages to Lynchburg. It was plain unadulterated unjust discrimination and undue preference when the legal rate relationship was destroyed regardless of the cause. This is true as the evidence shows that the Commission, for over 60 years, had in several decisions prescribed a different rate to Danville from the rate it prescribed to Lynchburg and that prescribed difference was 50 cents a ton in favor of Lynchburg when the reduction to Danville was first made. The *prescribed difference* in rates to Danville and Lynchburg has never been less than 40 nor more than 70 cents subsequent to the year 1900.

The existence of actual competition between Lynchburg and Danville was recognized by the Commission in 1900 in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409 and in that report, the Commission, at page 441, said:

> "The complaint alleges that the defendants by maintaining these rates not only violates the Fourth, but also the Third Section of the Act, in that it creates and continues an unjust discrimination against Danville as compared with Lynchburg. We have found that the discrimination exists. We have found that it is without justification. It is, therefore, an unjust discrimination under the Third Section, which must be prohibited."

The Commission sought to enforce its order in the Courts and the discrimination between Danville and Lynchburg was found by the Court to exist in *Interstate Com-*

merce Commission v. *Southern Railway*, 117 Fed. 741, appld. 122 Fed 800, app. dism. 195 U.S. 639, as the Court said:

> "The evidence in this case leaves no room for doubt that the competition at Lynchburg (as well as Richmond) is real and substantial."

The Danville people, in 1915, complained to the Commission that a rate of $2.20 per ton to Danville in comparison with a rate of $1.50 a ton to Lynchburg and other points from the Pocahontas base group results in unlawful rates at Danville. In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, the Commission composed the Danville and Lynchburg rates and, at page 441, said:

> "Bluefield, West Virginia, a point 160 miles west of Lynchburg, is the assembly point from the Pocahontas, Clinch Valley and Tug River Districts, from which the rates are $1.50 to Lynchburg and $2.20 per ton to Danville."

The Commission prescribed a rate of $2.10 per ton as a reasonable, just and otherwise lawful rate at Danville and the rate remained $1.50 to Lynchburg.

It was reversible error for the Commission and the District Court to hold that no violation of Section Three of the Act existed as the record shows the existence of the competition and the Commission, in 1900, found the rates then in effect to be an unjust discrimination and fixed a reasonable and just rate relationship between Lynchburg and Danville which would remove the discrimination and

establish a lawful level of rates on coal between the two points.

UNREASONABLE RATES

In 1900, the rate on coal was higher at Danville than at Lynchburg from the origin points here considered. However, Danville sought more reasonable rates in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409, and again sought more reasonable rates in 1915 when the rate was 220 cents a ton to Danville and to Lynchburg, 150 cents a ton. In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, it was alleged in 1915 that the present adjustment of rates between Danville and points in the west, east, and south is unreasonable in and of itself, unjustly discriminatory in that it unduly prefers Lynchburg, Richmond, and Roanoke and that the rates on coal from the Pocahontas and other West Virginia fields to Danville were specifically challenged as being both unreasonable and unjustly discriminatory.

The Commission on those allegations reduced the rate to Danville from 220 cents per ton to 210 cents to satisfy the undue preference and the unreasonableness of the rates between Lynchburg and Danville and in so doing, fixed then a rate relationship of 60 cents a ton in favor of Lynchburg.

The cases in which difference rates to Lynchburg and Danville have been prescribed are *Staunton Brick Co.* v. *C & O Railway*, 190 I.C.C. 302; *Virginia State Corporation Commission* v. *N & W Railway*, 190 I.C.C. 325; *Danville Chamber of Commerce* v. *C & O Railway*, 191 I.C.C. 20; *A. S. Nowlin and Company* v. *C & O Railway*, 213 I.C.C.

101; *Ashland Coal and Ice Company* v. *A.C.L.*, 256 I.C.C. 429; and *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291.

In each of these decisions, the Commission has prescribed higher rates to Danville than those prescribed to Lynchburg and the reason for the difference in rates is found in *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291, where the Commission, at page 318, said:

> "Upon consideration of the traffic and transportation conditions in the respective areas (which includes Lynchburg) and of the needs of shippers and consumers concerned, as well as the revenue needs of the carriers, we are convinced that the difference in the rate levels referred to (including the rate level to Lynchburg, page 318) is too great and that a reduction in the assailed rates generally to the eastern and western portions of the Carolinas; to Augusta area, and to Danville and Riddle, is warranted."

These decisions of the Commission clearly demonstrate that the Commission erred as did the District Court in holding that the rate is not unreasonable at Lynchburg. The record shows that the rate on fine coal to Lynchburg is unlawful as a matter of fact and law to the extent that the rate to Lynchburg is not less than the rate to Danville by 53 cent a ton.

In other words, how can the rate to Danville be not unreasonable at Lynchburg when the Commission has, for over 60 years, always prescribed lower rates to Lynchburg than to Danville. The rate to Danville, as a matter of law,

is unjust and unreasonable at Lynchburg and in positive violation of Section 3 of the Act.

NO COMPETITION BETWEEN COAL AND NATURAL GAS EXISTED AT DANVILLE

The report of the Commission in this proceeding shows that the reduction of 30 cents a ton to Danville made on April 8, 1954, was not made to meet competition between coal and other fuels at Danville nor was that reduction made to meet any competition at Danville. The report of the Commission shows that defendant carriers testified as to competition at Danville as follows:

> "The defendants testified that early in 1954, the carriers serving destinations in North Carolina and South Carolina ascertained that certain consumers particularly electric utility and other industries, were either substituting or threatening to substitute natural gas in lieu of fine coal and that there had been decline in rail movements of fine coal to such consumers. Thereupon, they reduced the rates on such coal by 35 cents. The reduction took effect on April 8, 1954, and on the same date the reduced level was established as maximum at intermediate points in southern Virginia to avoid violations of Section 4 of the Act. By the latter action, the rate from the base group to Danville, previously $3.98 on lump and fine coal, was reduced on fine coal to $3.68. At that time the rate to Lynchburg was $3.45, and that rate was continued in effect." (See Lynchburg Traffic Bureau v. C & O ..... I.C.C.) Appendix B, p. 40.

There is absolutely no evidence in the record to support

the decision of the Commission that the reduction to Danville of 30 cents a ton was compelled by competition at Danville between fine coal and natural gas or for any other competitive reason.

The second reduction made in 1958 of 35 cents a ton at Danville was not made to meet gas competition, as the report of the Commission shows:

> "The reduction then made met natural gas competition (in North and South Carolina) until 1958. Due to authorized general increase during the intervening period, aggregating 30 cents a ton, the carriers were again faced with the same situation as in 1954, and, on July 10, 1958, a further reduction of 35 cents was made to all points in North and South Carolina. Higher rates were maintained at intermediate points under authority of Fourth Section Order No. 18957 of July 9, 1958, until September 16, 1958, when the Southern, from origins on the Interstate Railroad reduced the rates to Danville and other destinations in southern Virginia by 35 cents from mines on the Southern and $1 from mines on the Interstate. THIS COMPELLED A REDUCTION ON OCTOBER 20, 1958, OF 35 CENTS FROM THE BASE GROUP TO DANVILLE and other destinations in southern Virginia. Later, effective April 29, 1959, all of the carriers established a further reduction of 10 cents to all points in southern Virginia, North Carolina, and South Carolina." (Emphasis added. See Lynchburg Traffic Bureau v. C. & O. Ry.) Appendix B, p. 41.

The above quotation from the report of the Commission

clearly shows that the entire reduction to Danville of 75 cents a ton was definitely not made to meet competition with other fuels at Danville. Furthermore, the Commission erred in considering the remarks of defendant carriers as to competition at Danville with natural gas, when in the words of defendant carriers, the reduction was not made to meet competition with gas at Danville as shown in the above quotation. The first reduction of 30 cents was made by holding the rate to a more distant point in North Carolina as the maximum rate at Danville. The second reduction to Danville of 35 cents was made because the Southern Railway reduced the rate to Danville by 35 cents from southwestern Virginia mines on the Southern Railway and the third reduction of 10 cents was made without any justification.

The report of the Commission is contrary to the evidence of record in that the record shows no competition at Danville between fine coal and natural gas and the report shows the following:

> "Although the prescribed maximum rates are now maintained on lump coal, the record shows that the defendants were and ARE FACED WITH COMPETITION AS BETWEEN FINE COAL AND NATURAL GAS, and for that reason, rates below the maximum prescribed or authorized by the Commission have been established on fine coal to various points in the south including Danville."

The record is absolutely void of any evidence showing that the reduction in the rate on fine coal was caused by any competition at Danville between fine coal and natural gas. Hence, the report of the Commission is contrary to

the facts of record and the report and order are not supported by substantial evidence.

RELATIONSHIP

It has already been pointed out that plaintiff before the Commission asserted that the rates on fine coal to Lynchburg are unlawful as a matter of law. The relationship in the rates between Danville and Lynchburg, which the Commission fixed, is 50 cents a ton less to Lynchburg than to Danville. The report of the Commission shows:

> "While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the Carolina Coal Consumers Case, supra, nor has any specific relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding. We conclude that the complaint has failed to show the assailed rates are unjust and unreasonable in violation of Section 1 of the Act." (See Lynchburg Traffic Bureau v. C & O Railway, Appendix B, p. 44.

The various decisions of the Commission disclose that the Commission has since 1915, and perhaps earlier than that date, prescribed a higher rate on coal to Danville than it prescribed to Lynchburg and the difference in rates prescribed or that voluntarily maintained by defendant

carriers has been 50 cents a ton for many years. In fact, a rate relationship existed in the rates on coal between Lynchburg and Danville, contrary to the report of the Commission and that relationship is actually shown in a decision of the Commission. In *A. S. Nowlin & Company* v. *C & O Railway*, 213 I.C.C. 101, when the Commission, at page 113, said:

> "To all points south of Lynchburg to and including Danville, there has been a parity of rates from all three groups of origin. From the base group of the Pocahontas carriers to Lynchburg and points south to and including Altavista, the rate was $2.39 prior to March 18, 1933, and $2.15 thereafter to points south of Altavista to and including Danville, the rate was $2.89 prior to April 10, 1933, and $2.55 thereafter."

The rate relationship was actually in existence in 1915 between Lynchburg and Danville as shown in a decision of the Commission.

In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, the Commission, in 1915, recognized the rate relationship between Lynchburg and Danville and said, at page 441, as follows:

> "The rates to points on the Southern Railway south of Lynchburg are blanketed; $2 to stations within 40 miles of Lynchburg and $2.20 to stations farther distant to and including Danville."

The relationship in rates between Danville and Lynch-

burg was again recognized by the Commission in *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291, where the Commission, at page 318, said:

> "Since the decisions in North Carolina Corporation Commiss' .. Aberdeen & R. R. Co. Supra, REDUCTIONS HAVE BEEN MADE IN THE POCAHONTAS RATE TO LYNCHBURG, RICHMOND, AND OTHER VIRGINIA POINTS; and in fact AS COMPLAINANT CHARGES THAT MOST OF THE RATES HERE ASSAILED, except to the eastern portion of the Carolinas, ARE ON A SUBSTANTIALLY HIGHER LEVEL THAN THE RATES TO THE SURROUNDING AREAS."

The above decisions of the Commission show that the report of the Commission is erroneous as a matter of law and fact as there is a definite fixed and prescribed relationship in the rates between Lynchburg and Danville. These statements are true as the Commission actually prescribed the rates to Danville and Lynchburg and, in doing so, the Commission actually prescribed the rate relationship. The District Court agreed with the Commission and dismissed the complaint.

CONCLUSION

The record before the Commission shows:

(a) That the Commission has for over 45 years prescribed a different rate on coal to Lynchburg than it prescribed to Danville and to disregard those decisions for

an alleged and unsupported allegation of competition at Danville between fine coal and natural gas at Danville is arbitrary, capricious and a gross abuse of discretion;

(b) That the defendant carriers admit in their evidence that the first reduction to Danville of 30 cents a ton was made to prevent violation of Section Four of the Act; that the second reduction of 35 cents was made to meet the rate the Southern Railway established to Danville from the Southwestern Virginia mines; and that the last reduction of 10 cents a ton to Danville was made without any justification. Therefore, to hold that the reductions in rates to Danville were made to meet competition between fine coal and natural gas is a holding unsupported by the evidence of record;

(c) That the Commission has established a rate relationship between Danville and Lynchburg on fine coal and lump coal in many decisions in which higher rates were prescribed by the Commission to Danville than the Commission prescribed to Lynchburg and those different rates actually established in law a rate relationship. In fact, the rate relationship was spelled out in 1915 and repeated in 1943 and to disregard that relation is arbitrary, capricous and an abuse of discretion; and

(d) That higher rates at Lynchburg than at Danville or the same rate at Lynchburg as the rate to Danville is unjust discrimination and undue preference and the existence of discrimination was proven in the record and established as a fact in decisions of the Commission and the existence of the competition was affirmed by a decision of the Courts in I.C.C. v. Southern, 195 U.S. 639. The failure of the Commission to so find is contrary to sub-

stantial evidence and decisions of the Court and is arbitrary, capricious and an abuse of discretion.

WHEREFORE, plaintiff respectfully prays that the appeal be granted and that the case be remanded to the lower Court with direction to find for the plaintiff.

Respectfully submitted,

W. G. BURNETTE, *Attorney for Lynchburg Traffic Bureau*

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia

March 17, 1964.

PROOF OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 17 day of March, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

Thomas B. Mason, Esq., United States Attorney for Western District of Virginia, Room ....., Federal Building, Lynchburg, Virginia.

The Solicitor General, Department of Justice, Washington 25, D. C.

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A. Paul Funkhouse, Esq., Attorney, Norfolk & Western Railway Company, Roanoke, Virginia; and

Martin A. Meyer, Jr., Esq., 200 Park Avenue, Suite 1002, New York 17, New York.

W. G. BURNETTE, *Attorney for Lynchburg Traffic Bureau*

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division

December 31, 1963

Civil Action No. 580.

Lynchburg Traffic Bureau,
a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,
and
NORFOLK AND WESTERN RAILWAY
COMPANY, ET AL.,
Intervening Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION OR REHEARING

Upon consideration of the motion of the plaintiff to reconsider and rehear this proceeding, first presented in the form of a letter from counsel for the plaintiff dated December 12, 1963 and renewed by a formal motion filed December 21, 1963, the Court finds no ground warranting reconsideration or rehearing of its opinion and order filed in this case on November 21, 1963, and accordingly it is

ORDERED that the said motion be, and it is hereby denied.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ JOHN PAUL
United States District Judge

/s/ THOMAS J. MICHIE
United States District Judge

A TRUE COPY, TESTE:

LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

[Caption Omitted]

FINAL ORDER

Upon the opinion of this Court, constituting its findings of fact and conclusions of law, this day filed, it is

ORDERED that the complaint in this action be, and it is hereby, dismissed, the defendants and intervening defendants recovering their costs of the plaintiff.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ JOHN PAUL
United States District Judge

/s/ THOMAS J. MICHIE
United States District Judge

November 21st, 1963.

A TRUE COPY, TESTE:
LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

[Caption Omitted]

ORDER

Upon request of plaintiff for enlargement of time in which the Clerk shall forward the record to Supreme Court and for plaintiff to complete its appeal, it is

ORDERED that the period of time be enlarged by 30 days from the present time for the record to be filed and appeal completed.

THOMAS J. MICHIE
United States District Judge
January 16, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division

Civil Action No. 580.

Lynchburg Traffic Bureau,
a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,
and
NORFOLK AND WESTERN RAILWAY
COMPANY, ET AL.,
Intervening Defendants.

ALBERT V. BRYAN, Circuit Judge:

Freight rates on bituminous *fine* coal from mines in Kentucky, Virginia and West Virginia to Lynchburg, Virginia maintained by the defendant ten railroads, the Lynchburg Traffic Bureau charged before the Interstate Commerce Commission, violated sections 1(5), 1(6), 2, 3(1) and 4 of the Interstate Commerce Act, 49 U.S.C. 1 et seq., as unjust and unreasonable, discriminatory, prejudicial to Lynchburg and unduly preferential to Danville, Virginia, 64 miles away. The complaint, filed July 21, 1961, sought to set aside the existing rates and to establish "lawful" ones. In the subsequent proceedings before the Commission, Docket No. 33831* it found the accusation unsubstantiated, and on January 5, 1962 dismissed the complaint. Thereupon the Bureau on April 3, 1963 filed this action against the United States to set aside the Commission's order. Intervention as parties defendant was allowed the Commission and the accused carriers.

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*Lynchburg Traffic Bureau v. Chesapeake and Ohio Railway Co.; Norfolk and Western Railway Company; Carolina, Clinchfield and Ohio Railway; Interstate Railroad Company; The Kanawha Central Railway Company; Winifrede Railroad Company; Campbell's Creek Railroad Company; Kelley's Creek and Northwestern Railroad Company; New York Central Railroad Company; The Virginian Railway Company (now Norfolk and Western Railway Company); and Southern Railway Company.

Fine, as distinguished from *lump*, bituminous coal is brought into Lynchburg from these fields at $3.60 per ton. This is the same as the fine coal rate to Danville which is 59 miles farther from the origins than is Lynchburg. The lump coal rate to Danville is 53¢ more than to Lynchburg—$4.35 as against $3.82. On these facts the plaintiff Bureau predicates its complaint, that is: (1) if the lump coal rate to Lynchburg is 53¢ less than to Danville and as the service in hauling the two kinds of coal is admittedly the same, the fine coal rate to Lynchburg should be 53¢ less than to Danville; and (2) as the fine coal rate to Danville is 75¢ less than the lump coal rate—$3.60 against $4.35—the fine coal rate to Lynchburg should be 75¢ less than the lump coal rate—that is it should be $3.07 for fine and $3.82, as now, for lump, instead of $3.60 and $3.82, respectively. The rate to Lynchburg is thus said to be unreasonable, discriminatory, preferential and prejudicial.

With frankness, plaintiff's counsel states that for proof he relies upon the history of the decisions of the Commission, in that, they have always fixed a lesser rate to Lynchburg than to Danville. The Bureau adverts especially to the early cases of Staunton Brick Co. v. Chesapeake & O. Ry., 190 I.C.C. 302 (1932) and State Corp. Com. of Va. v. Norfolk & W. Ry., 190 I.C.C. 325 (1932) putting the Lynchburg rate on all coal at $2.15 per ton, and to Danville Chamber of Commerce v. Chesapeake & O. Ry., 191 I.C.C. 20 (1933) placing the Danville rate at $2.55. Later and in the same pattern, Ashland Coal & Ice Co. v. Atlantic Coast Line R.R., 256 I.C.C. 429 (1943) prescribed a rate of $2.05 on all bituminous coal to Lynchburg, and Carolina Coal Consumers Conference v. A. & R.R., 270 I.C.C. 291 (1948) established a rate to Danville at $2.55. Afterwards,

general increases raised these to $3.82 and $4.35, respectively, thus increasing the difference from 50¢ to 53¢.

Subsequently, the carriers divided the bituminous coal classification into two classes: lump and fine coal. They left the lump coal rate at the former all-bituminous-coal rate of $3.82 to Lynchburg and $4.35 at Danville, but the fine coal rate was lowered, first at Danville and, on complaint of the plaintiff Bureau, then at Lynchburg, to $3.60.

We cannot uphold the plaintiff's charge that the Lynchburg rate is unjust or unreasonable in violation of § 1(5). The Commission has never fixed a rate for fine coal at either place. Nor has it ever established any relationship between Danville and Lynchburg with regard to rates. The most it has done is to declare the maximum rates on all-bituminous-coal as just mentioned. The carriers have placed the fine coal rate at less than these maxima. In this there was nothing unlawful. United States v. Illinois Central R.R., 263 U.S. 515, 524 (1924). When the new rate is not above the maximum, nor below what is reasonable, the carriers are at liberty to adjust them within this range, although the roads cannot be required to do so by the Commission. United States v. Chicago, M., St.P.&P.R.R., 294 U.S. 499, 506 (1935). It is to be noted that the plaintiff does not attack the maximum rates here and no minimum rates have been requested or established.

That the rate on fine coal to Danville is the same as that to Lynchburg, although Danville is farther from the mines, does not alone establish, in law or in fact, Lynchburg's rates to be unfair. Lynchburg Traffic Bureau v. United States, 84 F.Supp. 1012, 1017 (W.D. Va.) (3-judge court), *aff'd*, 338 U.S. 864 (1949). There are many factors other

than distance entering into a rate. Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 588, 593 (1949); Louisville & N.R.R. v. United States, 238 U.S. 1, 11, 12 (1915). Furthermore, whether or not the fine coal rates are unreasonable is a question of fact to be determined by the Commission and not one of law to be decided by the court. Lynchburg Traffic Bureau v. United States, *supra*, 84 F.Supp. 1012, 1016-17. Here the Commission has found no unreasonableness, and we think the evidence, or rather the lack of evidence indicating unreasonableness, fully justified this finding. In this situation we cannot interfere with the decision of the Commission. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535-536 (1946).

To repeat, the rate on lump coal to Danville is $4.35, but only $3.60 on fine coal—a difference of 75¢ between the two classes of coal—and at Lynchburg the rate is $3.82 on lump and $3.60 on fine coal—a difference of 22¢. On this basis, the failure of the carriers to allow Lynchburg a difference of 75¢ is charged, as already noted, as offending § 1(6) by creating an unlawful classification of coal; offending § 2 in unjustly discriminating against Lynchburg; and offending § 3 by preferring Danville to the prejudice of Lynchburg. The § 1(6) complaint obviously is but a repetition of the assertion that the rate is too high, and this we have already found unsustained. Moreover, a carrier may lawfully classify its traffic and, in this, separate the all-bituminous-coal rate into two classes. Interstate Commerce Commission v. Chicago, G.W. Ry., 209 U.S. 108, 119 (1908).

In respect to the § 2 grievance of discrimination, the answer is that this section has no relevancy here for it

applies only to rates as between shippers or receivers of similar commodities for the same haul and distance between the the same points. All such persons at Lynchburg are treated alike. The section does not apply to differences in rates between different destinations, such as Danville and Lynchburg. Ayrshire Corp. v. United States, *supra*, 335 U.S. 573, 584; Interstate Commerce Commission v. Western & A.R.R., 88 Fed. 186, 197 (1898), *aff'd*, 93 Fed. 83 (1899), modified on other grounds, 181 U.S. 29 (1901).

In response to the § 3 averment—that Danville and other places were preferred and Lynchburg prejudiced—the railroads show that they have assigned fine coal rates below those for lump coal only at such destinations, and by such amounts, as is required by competition at these points between fine coal and other fuel such as natural gas. This is unquestionably a lawful ground for the difference in rates. On this evidence and the determination that the rates are not otherwise unjust or unreasonable, the Commission has found that there was no preference or prejudice. This conclusion we cannot say is unwarranted in fact or in law. Thus it is binding upon the court. Board of Trade v. United States, 314 U.S. 534, 546 (1942).

The allegation of a violation of § 4 of the Act—forbidding a carrier to charge or receive greater compensation in the aggregate for a shorter than a longer haul—was apparently abandoned by the plaintiff in view of the equalization of the fine coal rates to Lynchburg and Danville. Certainly, however, the Commission's denial of it cannot on this record be overborne.

We have examined the other contentions of the plaintiff but also find no merit in them. The complaint will be dis-

missed for the reasons set forth in this opinion, which is adopted by the court as a statement of its findings of fact and conclusions of law.

A TRUE COPY, TESTE:

LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

APPENDIX B

This report will not be printed in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION
Service Date, November 6, 1962

No. 33831.

LYNCHBURG TRAFFIC BUREAU

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY ET AL.

Decided October 29, 1962.

Carload rates on bituminous fine coal from origins in Virginia, West Virginia, and Kentucky to Lynchburg, Va., found not shown to be unjust, unreasonable, or otherwise unlawful. Complaint dismissed.

W. G. Burnette for complainant.

John W. Hanifin, Preston C. Shannon, A. Paul Funkhouser, and *Martin A. Meyer, Jr.,* for defendants.

REPORT OF THE COMMISSION
RATES AND PRACTICES REVIEW BOARD, MEMBERS BROWN, PROUT, AND ROCK BY THE BOARD:

The modified procedure was followed. Exceptions to the examiner's recommended report and order, and replies thereto, were filed by the complainant and the defendants. Exceptions and requested findings not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

The complainant is a non-profit organization incorporated under the laws of the State of Virginia. The complainant's members are various individuals and companies engaged in business at Lynchburg, Va.

The defendants[1] are common carriers by railroad engaged in the transportation of property, including bituminous coal, between mines and other points in Kentucky, Virginia, and West Virginia, on the one hand, and on the other, points in North Carolina, South Carolina, and Virginia, including

[1] The defendants are The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Carolina, Clinchfield and Ohio Railway Company, Interstate Railroad Company, The Kanawha Central Railway Company, Winifrede Railroad Company, Campbell's Creek Railroad Company, Kelley's Creek and Northwestern Railroad Company, The New York Central Railroad Company, Virginian Railway Company (now Norfolk and Western Railway Company), and Southern Railway Company. When referred to herein, the carriers' titles are shortened or their initials are used.

Lynchburg. Bituminous coal includes two types of bituminous coal, known as fine coal and lump coal.

By complaint filed July 21, 1961, the complainant alleges that the rates[2] charged by the defendants on fine coal, described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent a two-inch mesh or two-inch round perforation", and on coal, other than fine, from mines and other points in the States of Kentucky, Virginia, and West Virginia to Lynchburg, Va., are unjust and unreasonable in violation of section 1, paragraphs (5) and (6), of the Interstate Commerce Act; unjustly discriminatory against Lynchburg and receivers of fine coal at that point to the extent the rates to that destination are relatively higher, distance considered, than those to Danville, Va., other points in Southern Virginia, and points in North Carolina and South Carolina in violation of section 2 of that Act; unduly prejudicial to Lynchburg and receivers of fine coal there located and unduly preferential of Danville, other points in Southern Virginia, and points in North Carolina and South Carolina, in violation of section 3 thereof; and in violation of section 4 of the act. The complainant seeks the prescription of lawful rates to Lynchburg for the future.

The coal originates at mine groups in Virginia, West Virginia, and Kentucky, generally known as the Pocahontas, New River, Tug River, Upper Buchanan, Virginian, Clinch Valley No. 1, Clinch Valley No. 2, Dante, N.F.&G., Thacker, Kenova, Tiller, Clincho, Interstate, and

[2] Rates and rate differences are stated per net ton.

Kanawha districts. On eastbound traffic all of the origins within the first-named 9 districts are in the same rate group, hereinafter called the base group, and those in the remaining 6 districts are in a group differentially related to the base group.

The base group, except the Dante and New River districts, is served by the Norfolk & Western; the New River district is served by the Chesapeake & Ohio; the Dante and Clincho districts by the C. C. & O.; the Interstate district by the Interstate Railroad Company; the N.F.&G. district by the New York Central; and within the Kanawha district certain origins are served by the Campbell's Creek, and others either by the Kanawha Central, the K.C. & N.W., or the New York Central.

Lynchburg and Danville are on the main line of the Southern. Lynchburg is 64 miles north of Danville and is this distance nearer to mines in the base group. In addition to the Southern, it is served by the Norfolk & Western and the Chesapeake & Ohio. The lines of the latter two carriers also serve the mines in the base group. Danville is served also by The Atlantic and Danville Railway Company and the Carolina and Northwestern Railway Company. Winston-Salem and Durham, N. C., are served by the Norfolk & Western and the Southern, and Greensboro, N. C., is served by the Southern.

The rates presently in effect and the average distances from the base group to Lynchburg, Danville, and representative points in North and South Carolina are shown in the following table:

Destinations	Average distances[1]	Rates[2] Lump coal	Rates[2] Fine coal	Rate differences, fine under lump
	(Miles)			(Cents)
Lynchburg, Va.	199	$3.82	$3.60	22
Danville, Va.	258	4.35	3.60	75
Winston-Salem, N. C.	266	4.51	3.71	80
Greensboro, N. C.	278	4.51	3.71	80
Durham, N. C.	316	4.62	3.84	78
Columbia, S. C.	(a)	5.10	4.30	80
Greenville, S. C.	(a)	5.05	4.25	80

[1] Distances to points named are those from the Pocahontas-New River districts shown in *Danville Chamber of Commerce* v. *Chesapeake & O. Ry. Co.*, 191 I.C.C. 20.

[2] The rates shown above include general increases to and including those authorized in Ex Parte No. 223.

(a) No distances shown.

The complainant seeks a rate on fine coal from the base group to Lynchburg of $3.07 or 53 cents lower than the rate on the same commodity to Danville, and from the higher-rated origin groups to Lynchburg it seeks a rate 10 cents per ton higher than the rate sought from the base group.

The allegation under section 1 is predicated upon prior proceedings in which just and reasonable maximum rates were prescribed on bituminous coal to Lynchburg and Danville. Attention is directed to *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I.C.C. 302, decided December 19, 1932, wherein a rate of $2.15 was prescribed from the New River district to Lynchburg; *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I.C.C. 325, decided on the same date, wherein the same rate was pre-

scribed to Lynchburg from the Pocahontas district and the mines served by the Virginian; and *Danville Chamber of Commerce* v. *Chesapeake & O. Ry. Co.*, 191 I.C.C. 20, decided January 30, 1933, wherein a rate of $2.55 was prescribed from the Pocahontas-New River group to Danville. The rates in those proceedings were prescribed on all bituminous coal, and no rate relationship as such was prescribed therein between Lynchburg and Danville. Nevertheless, the complainant takes the position that since the rates prescribed therein were to apply on all types of bituminous coal then moving, including lump coal and fine coal, and that the rate prescribed to Lynchburg was 40 cents lower than that to Danville, this difference was intended to reflect the greater transportation service to the latter destination. It is urged also that, since subsequently-authorized increases in the prescribed rates to both destinations have enlarged the 40-cent difference to 53 cents, the rate on both lump and fine coal should now be 53 cents lower to Lynchburg than to Danville.

Reference is made also to *Ashland Coal & Ice Co., Inc.*, v. *Atlantic Coast Line R. Co.*, 256 I.C.C. 429 (1943), and *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291 (1948). In the former a rate of $2.05 was prescribed on bituminous coal from the base group to Lynchburg, and in the latter a rate of $2.55 was prescribed from the Pocahontas district to Danville. The 50-cent spread between those rates, as increased by subsequently-authorized general increases, is now 53 cents, the difference between the rates on lump coal as shown in the foregoing table. Although the rates prescribed in the prior proceedings were established by the defendants on all types of bituminous coal, the complainant stresses that, subsequently, lower rates were established on fine coal to those destina-

tions than on lump coal. As appears from the foregoing table, the present rate to Lynchburg is 22 cents lower on fine than on lump coal, as compared with differences of 75 to 80 cents to the compared destinations.

The earnings from the assailed rate of $3.60 on fine coal to Lynchburg on a load of 100,000 pounds are 90.4 cents a car-mile, whereas the same rate to Danville yields 69.7 cents a car-mile. The rate sought of $3.07 would yield 77.1 cents a car-mile. If no commodity rates were published, the difference in the class rates as between Lynchburg and Danville under the rating provided in the uniform freight classification would be 4 cents per 100 pounds or 80 cents a ton.

Lump and fine coal generally move in the same train, usually in separate cars, and both types of coal are accorded the same handling. There is thus no substantial difference in the transportation services performed thereon by the defendants.

In respect of the allegation under section 2 of the act, the complainant relies on the same type of evidence as that submitted in support of the section 1 allegation. It contends, in substance, that by establishing rates to Danville and points in North and South Carolina from 75 to 80 cents lower on fine than on lump coal, and failing to maintain rates to Lynchburg reflecting the same difference on fine under lump coal, the defendants are unjustly discriminating against Lynchburg.

In support of the section 3 allegation, the complainant contends that by establishing rates on fine coal to Lynchburg only 22 cents below the corresponding rates on lump

coal, and maintaining rates to Danville and points in North and South Carolina reflecting greater spreads, the defendants are unduly prejudicing Lynchburg and consignees there located and unduly preferring the compared points and consignees located at such points. It stresses that Lynchburg and each of the compared points have chambers of commerce or other like organizations which compete with one another in efforts to attract new and retaining existing industries, that each such city requires just, reasonable, and otherwise lawful rates on a basic raw material such as fine coal to permit its development and growth, and that Lynchburg by reason of its relatively higher rates, distance considered, is in an unfavorable competitive position compared with Danville, Winston-Salem, Greensboro and Durham.

The record fails to show that any new industry has refused to locate at Lynchburg, or that any industry has left that city because of the assailed rate situation, or that any industry was induced thereby to locate at other points named. The complainant's evidence lists various commodities produced at each of the compared points and shows that many such products are the same or similar in nature. Attention is directed to the following in *Carolina Coal Consumers Conference* v. *A. & R. R. Co., supra*, page 314:

> Industrially, Danville is similar in many respects to points north and east thereof, such as Lynchburg and Richmond, and south thereof, such as Winston-Salem, Greensboro, and Durham.

In that proceeding, no violation of section 3 was alleged.

The complainant points out also that the population of

Lynchburg, Danville, and Durham in the decade from 1950 to 1960 increased by 15.3, 32.3, and 10.2 percent, respectively. There is no evidence, however, which shows that the rate situation complained of was responsible for the smaller growth at Lynchburg.

The defendants point out that no difference in rates on lump and fine coal has been prescribed by the Commission from these origins to any destination served by them. They state that whenever rates on fine coal have been established by them on a level lower than on lump coal, the extent of the reduction on fine coal to each destination has been determined by the degree of competition as between different types of fuel, or between different rail carriers or with other modes of transportation. They point to the facts that there is no standard definition of fine coal, that the descriptions of such coal may vary dependent upon the competitive circumstances, and that their coal tariffs contain various descriptions other than that mentioned in the complaint. It appears, however, that the above-quoted description in the complaint is the same as that of fine coal to Danville, Winston-Salem, Greensboro, and Durham.

The rate to Lynchburg on both fine and lump coal prior to August 21, 1961, reflected the basis prescribed in *Ashland Coal & Ice Co.* v. *Atlantic Coast Line R. Co.*, *supra*, as subsequently modified by authorized general increases. On the latter date the rate on fine coal was reduced 22 cents as shown in the foregoing table. No corresponding reduction was made in the rate on lump coal. In prescribing the rate on bituminous coal, both fine and lump, in the *Ashland Coal and Ice Co.* case the Commission made no reference to Danville nor to any point in southern Virginia

or North Carolina. The defendants therefore urge that the rate prescribed to Lynchburg bore no relation to such destinations, but was determined in relation to the rates then applicable to Buena Vista, Farmville, and Charlottesville, Va. Later, however, in *Carolina Coal Consumers Conference* v. *A. & R. R. Co., supra,* the Commission passed upon the lawfulness of the rate to Danville, as well as the rates to other points south thereof, including Winston-Salem, Greensboro, and Durham, and in doing so reference was made to the report in the *Ashland Coal & Ice* case and to the shorter distance to Lynchburg than to Danville and the above-named North Carolina destinations. It is thus clear that in prescribing rates on bituminous coal to Danville and the North Carolina points in the latter proceeding, the Lynchburg rate and the distances for which it applied were considered in determining the rates prescribed therein to Danville and the other more distant points.

In explaining the reasons for establishing rates on fine coal lower than on lump coal, the defendants testified that early in 1954 the carriers serving destinations in North and South Carolina ascertained that certain consumers, particularly electric-utility and other industries, were either substituting or threatening to substitute natural gas in lieu of fine coal and that there had been a decline in the rail movement of fine coal to such consumers. Thereupon they reduced the rates on such coal by 35 cents. Industries of this type do not normally use lump coal, and consequently there was no competitive necessity for a reduction on lump coal. The reduction took effect on April 8, 1954, and on the same date the reduced level was established as maximum at intermediate points in southern Virginia to avoid violations of section 4 of the act. By the latter action the

rate from the base group to Danville, previously $3.98 on lump and fine coal, was reduced on fine coal to $3.68. At that time the rate to Lynchburg was $3.45, and that rate was continued in effect.

The reduction then made met natural gas competition until 1958. Due to authorized general increases during the intervening period, aggregating 30 cents a ton, the carriers were again faced with the same situation as in 1954, and, on July 10, 1958, a further reduction of 35 cents was made to all points in North and South Carolina. Higher rates were maintained to intermediate points under authority of Fourth Section Order No. 18957 issued on July 9, 1958, until September 16, 1958, when the Southern, from its origins in southwestern Virginia and from origins on the Interstate Railroad, reduced the rates to Danville and other destinations in southern Virginia by 35 cents from mines on the Southern and $1 from mines on the Interstate. This compelled a reduction on October 20, 1958, of 35 cents from the base group to Danville and other points in southern Virginia. Fourth-section relief permitted the rate then in effect to Lynchburg to remain undisturbed. Later, effective April 29, 1959, all of the carriers established a further reduction of 10 cents to all points in southern Virginia, North Carolina, and South Carolina.

When the foregoing reductions were made, the rate to Lynchburg was $3.75 on both lump and fine coal. The resulting rates on fine coal from the base group to Danville became $3.63 on October 20, 1958 and $3.53 on April 29, 1959. On October 24, 1960, due to the increase of 7 cents authorized in Ex Parte No. 223, the rate from the base group to Danville became $4.35 on lump coal and $3.60 on fine coal, compared with $3.82 to Lynchburg on both

types of coal, and that situation prevailed when the complaint was filed. The existence of a higher rate on fine coal to Lynchburg than to Danville was removed on August 21, 1961, when the rate on fine coal to Lynchburg was reduced from $3.82 to $3.60, the same as the rate on fine coal to Danville, thus removing the basis for the complainant's allegation under section 4 of the act.

The defendants contend that, since the rate on fine coal to Lynchburg is now the same as that presently maintained to Danville, there is no present cause for complaint. Moreover, they assert that Danville is served by the Transcontinental Gas Pipe Line Corporation, a major gas line, whereas Lynchburg is served by a smaller carrier, the Lynchburg Gas Company, which receives only a limited supply of gas from the Atlantic Seaboard Corporation; that an application to the Federal Power Commission by the Lynchburg Gas Company in 1959 for authority to secure an alternate supply of gas from the Transcontinental Gas Pipe Line Corporation to permit it to serve the major coal-consuming industries at Lynchburg was denied, which denial was upheld by the courts; and that as a result the competition and the threat of competition between gas and fine coal is materially greater at Danville than at Lynchburg. They state also that in 1961 the Norfolk & Western and the Chesapeake & Ohio delivered about 143,000 tons of coal at Lynchburg, 94 percent of which was delivered to 16 industries, and that none of those industries, nor any of the consumers to whom the remaining 6 percent of the aggregate tonnage was delivered, is in competition with any consumer of fine coal at Danville.

Discussion and Conclusions.—The hearing examiner concluded that the complainant had failed to sustain its alle-

gations that assailed rates are unlawful, in violation of sections 1, 2, 3, or 4 of the act. The complainant excepted to the examiner's findings with respect to sections 1, 2, and 3. No exception was taken to the examiner's finding that the basis for the section 4 allegation had been removed by the subsequent establishment by the defendants of the same rate on fine coal to Lynchburg as that applicable on the same commodity to Danville. We concur in that finding.

Under section 1 of the act, the railroads are entitled to publish and charge reasonable maximum rates. So long as the railroads do not go below the minimum limit of reasonableness they may voluntarily publish rates which do not attain the maximum, but the Commission cannot, under section 1 alone, require them to do this. *Eastern Class Rate Investigation*, 164 I.C.C. 314, 382, and *South Chicago Coal & Dock Co.* v. *Chicago S. L. Ry. Co.*, 223 I.C.C. 619, 622. The prescribed rates on bituminous coal to Lynchburg and the other compared destinations were based upon the respective distances from the base origin group, and those rates as modified by subsequently authorized general increases, now reflect reasonable maxima levels. Although the prescribed maximum rates are now maintained on lump coal, the record shows that the defendants were and are faced with competition as between fine coal and natural gas, and for that reason, rates below the maximum prescribed or authorized by the Commission have been established on fine coal to various points in the south, including Danville. While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the *Carolina Coal Consumers case*, *supra*, nor has any specific

relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding. We conclude that the complainant has failed to show the assailed rates are unjust and unreasonable in violation of section 1 of the act.

In order to prove a violation of section 2 of the act, the evidence must show that the defendants, either directly or indirectly, charge, demand, collect, or receive from one shipper a greater or less compensation than from another for the performance of a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. There can be no unjust discrimination within the meaning of section 2 of the act when the compared transportation is not from and to the same points as the transportation allegedly subject to the unjust discrimination. See *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 773, 781, and *Gar Wood Industries, Inc.*, v. *Alton & S.R.*, 263 I.C.C. 611, 616. All receivers of fine coal at Lynchburg are accorded the same rate from the same origins and for the same service, and consequently no discrimination in violation of section 2 is shown by the evidence. See *Miller Waste Mills, Inc.*, v. *Chicago, M., St. P. & P. R. Co.*, 226 I.C.C. 451, 453.

On exceptions, the complainant urges that its showing of more favorable rates to Danville than to Lynchburg establishes a *prima facie* case of undue prejudice and preference, in violation of section 3 of the act; and that, as a matter of law, the burden to show conclusively that the rates here complained of are not unduly prejudicial or preferential rests upon the defendants. In support, it cites *State of*

New York v. United States, 331 U.S. 284, in which the following appears:

> It is a matter of right, not of grace by the railroads, that regions and shippers shall not be prejudiced or their competitors preferred.

Nothing in the foregoing decision may be interpreted as overruling the oft-repeated holdings of the courts and the Commission that a mere difference in rates or in distances between particular points at the same rate is inadequate support for a section 3 finding; and that the burden of supporting an allegation under that section with adequate proof rests upon the complaint. To establish undue prejudice, in addition to the showing of a rate difference or a difference in distance at the same rate, there must be evidence of forceful competition between persons or localities under the rates complained of, and that the rate adjustment has operated to the complainant's disadvantage. See *Cudahy Packing Co.* v. *Atchison, T. & S.F. Ry. Co.*, 234 I.C.C. 569, 575.

It is true that where such evidence is of record, the burden is upon the carriers to show by convincing evidence that a sufficient dissimilarity in the transportation circumstances exists to justify a difference in the rate treatment, *Continental Steel Corp.* v. *New York, C. & St. L. R. Co.*, 256 I.C.C. 167, 174, but the absence of this latter evidence would not afford a basis for relief without the above-indicated showing by the complainant.

Here, the complainant has failed to show that there is competition between consumers of fine coal at Lynchburg and consumers of like coal at Danville, or that the rate

adjustment has operated to the disadvantage of the complainant or any receivers of coal there located. On the other hand, the defendants have shown, without contradiction, that the present rates on fine coal to Danville are compelled by gas competition, and that this competitive factor is not compelling at Lynchburg. In these circumstances, there is no sound basis for a finding of undue prejudice or preference.

As stated, the basis for the allegation under section 4 was removed on August 21, 1961, when the same rate on fine coal was established to Lynchburg as to Danville.

We find that the assailed rates are not shown to be unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or violative of section 4 of the act. The complaint will be dismissed.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Rates and Practices Review Board, held at its office in Washington, D. C., on the 29th day of October, A. D. 1962.

No. 33831.

LYNCHBURG TRAFFIC BUREAU

v.

CHESAPEAKE & OHIO RAILWAY COMPANY ET AL.

This proceeding being at issue upon complaint and an-

swers on file, and having been duly submitted by the parties, and full investigation of the matters and things involved having been made, and said Board having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Rates and Practices Review Board.

(SEAL)

HAROLD D. MCCOY,
Secretary